

**CITIZEN TRADE POLICY COMMISSION  
DRAFT AGENDA**

**Public Meeting**

Wednesday, July 11, 2012 at 1:00 P.M.  
Room 220, Burton M. Cross State Office Building  
Augusta, Maine

**1:00 PM Public Meeting called to order**

**I. Welcome and introductions**

**II. Update on recently completed round of TPPA negotiations in San Diego; Representative Sharon Treat**

**III. Discussion on possible CTPC actions regarding the recently presented 2012 Trade Policy Assessment by Professor Robert Stumberg, Director of the Harrison Institute for Public Law and Professor of Law, Georgetown University Law Center**

**IV. Adjourn**



**MEDIA RELEASE**  
**JULY 5, 2012**

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Washington Senator Maralyn Chase,  
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***National Media Briefing 2 pm EDT***  
***1-800-377-8846***  
***Passcode: 68429519#***  
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**As High-Profile Trade Talks Launch on July 4th Eve,  
Legislators from all 50 U.S. States Warn:  
We'll Oppose Trans-Pacific Partnership (TPP) if it  
Undermines Democracy, Allows Corporate Attacks on  
U.S. Laws Before Foreign Tribunals**

Augusta, ME and Olympia, WA- While U.S. trade negotiators are meeting behind closed doors in San Diego, 130 state legislators from all 50 states and Puerto Rico have signed a letter to President Obama's senior trade official warning that they will oppose the deal unless the administration alters its current approach.

"The lack of transparency of the treaty negotiation process, and the failure of negotiators to meaningfully consult with states on the far-reaching impact of trade agreements on state and local laws, even when binding on our states, is of grave concern to us," the legislators write in their July 5 letter.

The letter focuses particularly on the "investor-state" dispute settlement system. This controversial scheme elevates individual companies to the status of signatory countries in allowing them to privately enforce the proposed agreement by suing signatory governments before foreign tribunals. The legislators' letter states that the investor-state provision "has proven to be extremely problematic, undermining legislative, administrative, and judicial decisions, and threatening the system of federalism established in the U.S. Constitution."

"The U.S. government should not be negotiating trade deals that undercut responsible state and federal laws enacted to protect public health and the environment, preserve the stability of our financial system, or make sure working conditions are safe and healthy," said Maine State Representative Sharon Treat, who drafted the letter with Washington State Senator Maralyn Chase and circulated it among legislators nationally.

"The letter is a strong political statement to the U.S. government opposing negotiating away our sovereignty", said Washington State Senator Maralyn

Chase. "When legislators from all 50 states and Puerto Rico are united in their concern about U.S. trade officials undermining our nation's founding principles of democracy, federalism and checks and balance, its time for the administration to change its approach."

"Trade agreements now extend well beyond simply preventing discriminatory tariffs, and instead seek to "harmonize" laws and regulations among trading partners," said Rep. Treat. "Our experience with NAFTA and other trade deals shows that investor-state dispute settlement is used by large corporations to undermine state and federal laws they don't like-- laws that are fully constitutional, that do not discriminate, and that are needed to protect public health and safety."

"Providing even more opportunities for the industry to undermine state and national tobacco prevention and public health measures would be a big mistake," said Assembly Member Richard N. Gottfried, chair of the NY State Assembly Health Committee, a signer of the letter. Philip Morris is currently using the investor-state clause of the Hong Kong-Australia trade agreement to challenge Australia's plain packaging cigarette law, a public health measure intended to discourage smoking.

"International trade agreements can be designed to lift environmental, labor and human rights standards across the globe, improving living conditions abroad," said Wisconsin State Representative Mark Pocan in his statement on signing the letter. "Why we would negotiate a trade deal that would expose ourselves to lawsuits by foreign corporations because they don't like our laws that protect the environment, workers' rights and access to health care is beyond me." Rep. Pocan is the author of the American Jobs Act in the Wisconsin State Assembly, which prohibits state government agencies from spending Wisconsin taxpayer dollars to contract with companies that will ship those jobs overseas.

The Trans-Pacific Partnership is becoming an expansive international treaty with global reach. Trade negotiators from the United States and eight other Pacific Rim countries are finalizing provisions of the agreement in San Diego this week and next. The negotiations currently include Vietnam, Brunei Darussalam, Singapore, Malaysia, New Zealand, Australia, Peru and Chile. The agreement is intended to expand to other Pacific Rim countries in the future. Mexico and Canada were formally invited to join in June, and Japan has announced its intention to participate.

The state legislators' letter was sent to the United States Trade Representative Ron Kirk and lead TPP negotiator Barbara Weisel today. The letter specifically endorses the current National Conference of State Legislatures (NCSL) policy that strongly opposes these private dispute settlement clauses like the investor state system in the TPP.


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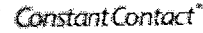
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Representative Sharon Treat | 22 Page Street | Hallowell | ME | 04347

**AN OPEN LETTER FROM U.S. STATE LEGISLATORS  
TO NEGOTIATORS OF THE TRANS-PACIFIC PARTNERSHIP  
URGING THE REJECTION OF INVESTOR-STATE DISPUTE SETTLEMENT**

As elected members of our state legislatures from throughout the United States, we value international trade when fair rules are in place, and encourage our states to actively participate in the global economy in furtherance of economic prosperity.

Modern trade agreements have impacts that extend significantly beyond the bounds of traditional trade matters, such as tariffs and quotas, and can undermine the role of the states in protecting the public health, safety and welfare through our system of federalism, as established in the U.S. Constitution. Trade rules can limit state sovereignty and our authority as legislators to regulate to ensure a level playing field for workers and businesses or to include meaningful human rights, labor and environmental standards.

The lack of transparency of the treaty negotiation process, and the failure of negotiators to meaningfully consult with states on the far-reaching impact of trade agreements on state and local laws, even when binding on our states, is of grave concern to us.

We have a particular concern about the impact on state regulatory, legal, and judicial authority if the Investor-State dispute arbitration provisions are adopted as part of the Trans-Pacific Partnership (TPP) agreement. The TPP, which is currently under negotiation among nine Pacific Rim nations including the U.S. -- and may be expanded to include NAFTA partners Canada and Mexico plus Japan -- is a wide-ranging treaty that will likely have significant implications for the states.

Investor-state dispute settlement (ISDS) clauses allow foreign investors the right to sue governments directly in offshore private investment tribunals, bypassing the courts and also allowing a "second bite" if the investors do not like the results of domestic court decisions. Although the investor-state tribunal has no power to nullify U.S. federal, state, and local laws, in practice, when a country loses to an investor, it will change the offending law, or pay damages, or both. Moreover, a country need not even lose a case for the chilling effect to impact its future policy making deliberations.

While these powers are not new, the TPP negotiation comes amidst mounting criticism of the rapid rise in Investor-State claims, as foreign corporations use these powers to challenge core public policy decisions. In particular, there is increasing concern about the way that investor-state disputes in bilateral investment treaties and free trade agreements are being used to challenge domestic legal processes, including processes and decisions of national courts. Recent examples include challenges to mining regulations and tobacco labeling laws, including a challenge to a state jury determination under the North American Free Trade Agreement (NAFTA).

Increasingly decisions issued under this system result in foreign investors being granted greater rights than are provided to domestic firms and investors under the Constitutions, laws and court systems of host countries. In several instances, arbitral tribunals have gone beyond awards of cash damages and issued injunctive relief that creates severe conflicts of law. For instance, a recent order by a tribunal in the case brought by Chevron against Ecuador under a U.S.-Ecuador bilateral investment treaty ordered the executive branch of that country to suspend the enforcement of an appellate court ruling, violating its constitutional separation of powers.

State legislators in the U.S. have adopted a clear position opposing Investor-State dispute settlement clauses in trade agreements. The National Conference of State Legislators (NCSL), which represents all 50 states and the District of Columbia, has adopted the following policy with respect to ISDS:

*NCSL will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations.*

*NCSL believes that BIT and FTA implementing legislation must include provisions that deny any private action in U.S. courts or before international dispute resolution panels to enforce international trade or investment agreements. Implementing legislation must also include provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are binding on the states as a matter of U.S. law.<sup>1</sup>*

We strongly endorse this position, and urge the U.S Trade Representative to remove any Investor-State dispute settlement clause from further consideration for inclusion in the TPP.

We are encouraged that the Government of Australia has said it is unwilling to submit to Investor-State dispute settlement powers under a TPP and other future trade agreements, and we urge the TPP negotiators to exclude the Investor-State system for all countries participating in the TPP, not just Australia.

Five years ago, the South Korea Supreme Court wrote a briefing paper on the implications of ISDS on its judicial system, during negotiations for the Korea-U.S. free trade agreement. Because these trade negotiations were conducted in secret, the Court's document, and the fact that it cautioned that the ISDS could cause "extreme legal chaos," has just come to light. The Korean government now seeks to renegotiate this key treaty provision *after* ratification and signing of the KORUS free trade agreement by both countries.

We have an opportunity to prevent a repeat of the problems ISDS has created in NAFTA, KORUS and other trade agreements if U.S negotiators act now to exclude this provision from the TPP. The ISDS has proven to be extremely problematic, undermining legislative, administrative, and judicial decisions, and threatening the system of federalism established in the U.S. Constitution. It interferes with our capacity and responsibility as state legislators to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment. It should have no place in the Trans-Pacific Partnership.

Thank you for your consideration.

Signed:

Dated: July 5, 2012

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<sup>1</sup> <http://www.ncsl.org/state-federal-committees/sclaborecon/free-trade-and-federalism.aspx>, NCSL Labor and Economic Development Committee – Policy on Free Trade and Federalism (expires August 2013)

July 5, 2012

Ambassador Ron Kirk  
Trade Representative  
Office of the United State Trade Representative  
600 17<sup>th</sup> St, NW  
Washington, D.C. 20508

Dear Mr. Ambassador:

Enclosed please find a letter signed by state legislators from all 50 states and Puerto Rico stating our strong opposition to the inclusion of any investor-state dispute settlement provisions in the Trans-Pacific Partnership (TPP) agreement currently under negotiation.


As elected members of our state legislatures from throughout the United States, we value international trade when fair rules are in place, and encourage our states to actively participate in the global economy in furtherance of economic prosperity. The lack of transparency of the negotiation process, and the failure of negotiators to *meaningfully* consult with states on the far-reaching impact of this and other trade agreements on state and local laws, even when binding on our states, is of grave concern to us.

We have a particular concern about the impact on state regulatory, legal, and judicial authority if the investor-state dispute arbitration provisions are adopted as part of the TPP free trade agreement. While these powers are not new, the TPP negotiation comes amidst mounting criticism of the rapid rise in investor-state claims, as foreign corporations use these powers to challenge core public policy decisions such as mining regulations and tobacco labeling laws, including a challenge to a state jury determination under the North American Free Trade Agreement (NAFTA).

With the strong push by negotiators to wrap up major TPP provisions in San Diego this week and next, the expansion of the TPP to include Canada and Mexico and possibly Japan, and the likelihood of a September negotiation round, we believe it is imperative to state our concerns about the investor-state provisions in the strongest possible terms at this time. We note that the National Conference of State Legislators (NCSL), which represents all 50 states and the District of Columbia, also has a longstanding policy position in strong opposition to investor-state dispute settlement.

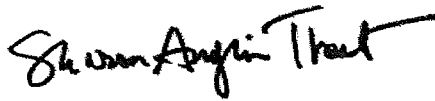
Thank you for your consideration of this matter. Feel free to contact us for additional information or to follow up on this letter.

Sincerely,



Senator Maralyn Chase

32<sup>nd</sup> Legislative District  
Washington State Legislature  
P.O Box 40600  
Olympia, WA 98504-0600  
Maralyn.Chase@leg.wa.gov



Representative Sharon Anglin Treat

House District 79  
Maine House of Representatives  
22 Page Street  
Hallowell, ME 04347  
RepSharon.Treat@legislature.maine.gov

cc. Barbara Weisel

## **US Capitol Capsule: Lawmakers voice concerns over Trans-Pacific Partnership**

*Today*

*Donna Young*

US state lawmakers last week joined a growing chorus, which also includes some members of Congress, calling for transparency and a cautious approach in the ongoing highly secretive negotiations for the Trans-Pacific Partnership (TPP) free-trade agreement with Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, Canada and Mexico, with the 13th round of the pact's talks, which began on 2 July, concluding on 10 July in San Diego.

The Obama administration has maintained the TPP, which Japan also is considering joining, is the best vehicle for the US to advance its economic interests in the "critical" Asia-Pacific region, with the US president last fall declaring the agreement would "boost" the economies of the nations involved, while also "lowering barriers to trade and investment, increasing exports and creating more jobs for our people, which is my number-one priority" (scripintelligence, 14 November 2011, 16 November 2011).

But some federal and state lawmakers are asserting the scope of the TPP has significantly changed from the initial plan and is becoming an expansive international treaty with global reach, with important policy decisions being made without the full input from Congress and little contribution from American small businesses, civil society or other stakeholders with a direct and long-term interest in the outcome of the negotiations.

Representative Darrell Issa (Republican-California) late last month sought to sit in on and observe the TPP negotiations in San Diego.

But United States Trade Representative (USTR) Ambassador Ron Kirk last week turned Mr Issa down, telling the lawmaker he was welcome instead to attend the "public portions" of the event -- a response the California Republican said blocked his "fundamental constitutional responsibility."

"The TPP process should be transparent and open to oversight, not a secretive backroom negotiation," Representative Issa charged. "Congress has a constitutional duty to oversee trade negotiations and not simply act as a rubber stamp to deals about which they were kept in the dark."

"If Congress and the public are not informed of the exact terms of the agreement until the conclusion of the process, then any opportunity for meaningful input is lost," 130 House members said in a 27 June letter to Ambassador Kirk. "We are troubled that there may be needless secrecy and over-classification of documents associated with the release of drafts of the pact's various chapters, or even providing a summary of each of the administration's policies that they have proposed to other countries."

The USTR has maintained that to create the conditions necessary to successfully reach agreement in complex trade and investment negotiations, governments routinely keep their proposals and communications with each other confidential.

Sean Flynn, a professorial lecturer in residence and an associate director of the Program on Information Justice and Intellectual Property at American University Washington College of



Law, told *Scrip* the USTR believes its prospects of getting an agreement concluded on "extremely controversial issues like pharmaceutical regulation and freedom on the Internet depend on no one knowing what is in the agreement until it is finished."

The Pharmaceutical Research and Manufacturers of America (PhRMA), whose representatives have participated in the closed-door TPP negotiations, has pushed for strong intellectual property protections in the agreement.

But the Washington watchdog Public Citizen asserted the IP proposals in the TPP, according to the group's analysis of leaked documents, would create monopoly patent rights for the brand-name pharmaceutical industry, effectively keeping cheaper generics off the market for an additional seven years and cutting poor consumers' access to life-saving medicines.

Public Citizen also argued that the USTR is "set to undermine" the Obama administration's own domestic health care cost initiatives through the TPP.

"Is this a case of one arm of the Obama administration not knowing what the other is doing?" Public Citizen asked.

In May, Senator Ron Wyden (Democrat-Oregon) introduced legislation that would give all members of Congress and their staff with appropriate clearance access to the substance of trade negotiations.

"Put simply, this legislation would ensure that the representatives elected by the American people are afforded the same level of influence over our nation's policies as the paid representatives of PhRMA, Halliburton and the Motion Picture Association," Mr Wyden declared.

Senator Sherrod Brown (Democrat-Ohio) also introduced a bill last month aimed at restoring congressional oversight of trade negotiations, while ensuring all trading partners play by the same rules.

"It's troubling that corporate CEOs often have better access to information about trade negotiations than the American people's elected representatives – or the American people themselves," Mr Brown, joined by Mr Wyden and two other Democratic senators, Jeff Merkley (Oregon) and Robert Menendez (New Jersey), said in a 25 June letter to Ambassador Kirk.

But at a 21 June hearing of the Senate Finance Committee, Ambassador Kirk said any member of Congress that wants to see text of the TPP or any other trade agreement the USTR is negotiating has the ability to do so in "secure environment."

In a 5 July letter to Mr Kirk and lead TPP negotiator Barbara Weisel, 130 state-level legislators contended that the "lack of transparency of the treaty negotiation process, and the failure of negotiators to meaningfully consult with states on the far-reaching impact of trade agreements on state and local laws, even when binding on our states, is of grave concern to us."

The state and federal lawmakers both raised concerns about the contents of leaked documents describing the TPP's proposed "investor-state" dispute settlement system.

Investor-state dispute settlement clauses, the state legislators said, would allow foreign investors the right to sue governments directly in offshore private investment tribunals – bypassing the courts and also allowing a "second bite" if the investors do not like the results of domestic court decisions.

Public Citizen asserted drug companies with qualifying investments in the US could attempt to challenge government cost-containment measures as "denials of national treatment or fair and equitable treatment, among other worrying investment chapter disciplines" under the proposed investor-state provisions of the TPP.

While the investor-state tribunal has no power to nullify US federal, state or local laws, when a state or country loses to an investor, it likely would result in the "offending" law being changed, with damages also likely to be paid, the state lawmakers said.

"Moreover, a country need not even lose a case for the chilling effect to impact its future policy making deliberations," the state legislators argued.

During a 5 July media briefing, Washington state Senator Maralyn Chase (Democrat-Shoreline) said she is concerned the US government is "negotiating away our sovereignty."

"We think this is a dangerous challenge to our democracy," she said. "We think it could be a violation of our Constitution. At the very least, it produces a democracy deficit."

Ms Chase asserted the proposed investor-state tribunal is "another step by corporations and their advocates to establish a global government."

"In my heart of hearts, what I am afraid of is that we are beginning to establish a global government that is without the consent of the governed," Ms Chase declared. "There is no consent of the citizens to this new global constitution."

She emphasized the state legislators' concern with the TPP is not about trade, but rather trade policy.

"We all support trade," Ms Chase said.

Maine state Representative Sharon Treat (Democrat-Hallowell), who drafted the 5 July letter with Ms Chase, told reporters the tribunal process essentially puts "important decisions in the hands of corporate attorneys who are not bound by rules of the Constitution that govern our court system."

"It's not a question of tweaking the language," she said. The investor-state provisions are "something that should not be there."

Ms Treat insisted the US government should not be negotiating trade deals that "undercut responsible state and federal laws enacted to protect public health and the environment, preserve the stability of our financial system, or make sure working conditions are safe and healthy."

Representative Treat is one of the few state legislators that is a "cleared adviser" for the TPP negotiations and is permitted to read the draft text as it becomes available, although she is not allowed to talk about it, other than what has been leaked to the public.

"I am pretty much overwhelmed by trying to look at this. I may get two days notice to comment on it and the sweeping provisions," she said.

"There's a huge potential for mistakes to be made" in the TPP, with the US unable to back out of the deal unless all countries agree, Ms Treat argued. The US, she added, "could find itself over a barrel."

<http://www.scripintelligence.com/home/US-Capitol-Capsule-Lawmakers-voice-concerns-over-Trans-Pacific-Partnership-332559>

Sen. Roger Sherman, Chair  
Sen. Thomas Martin Jr.  
Sen. John Patrick  
Rep. Joyce Maker, Chair  
Rep. Bernard Ayotte  
Rep. Margaret Rotundo

Heather Parent  
Stephen Cole  
Michael Herz  
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STATE OF MAINE

## Citizen Trade Policy Commission

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Michael Roland  
Jay Wadleigh  
Joseph Woodbury

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Lock Kiermaier

July 9, 2012

### Possible CTPC Actions Regarding 2012 Assessment

On June 15, 2012, the CTPC conducted a Public Hearing to receive a presentation of the "2012 Trade Policy Assessment" by Professor Robert Stumberg of Georgetown University. As specified in a contractual agreement, the 2012 Assessment covered 3 primary topics:

1. **Treatment of Tobacco in the TPPA**
2. **Pharmaceutical Provisions in the TPPA**
3. **Government Procurement**

At the 6/15/12 Public Hearing, CTPC reviewed a draft copy of the 2012 Assessment. Since that date, based on minor editing comments and suggestions received from CTPC members and staff, Professor Stumberg has produced a final version of the 2012 Assessment. Printed copies will be provided to the CTPC members at the 7/11/12 meeting of the CTPC and a downloadable version of that document is available at the CTPC website:

<http://www.maine.gov/legis/opla/citpol.htm>

During the presentation at the Public Hearing, Professor Stumberg identified a number of possible questions and issues regarding each of the primary topics. The purpose of this document is to extract the questions and issues raised by Professor Stumberg in a manner by which the CTPC can carefully consider which, if any, of these issues the CTPC may wish to take action on.

The following sections are organized in the same manner and sequence as provided

in the *2012 Trade Policy Assessment*. The questions and issues have been copied verbatim with occasional background information and comments by CTPC staff displayed in italics.

## **Treatment of Tobacco in the TPPA**

### **Introduction from Professor Stumberg.**

Tobacco use is the “leading global cause of preventable death.”<sup>1</sup> Should a 21st century trade agreement expand or restrict tobacco trade? Philip Morris International (PMI) asked USTR to extend to tobacco companies the same benefits that the TPPA would provide to all other sectors. These include increased market access for goods and services, stronger trademark protections, and expanded rights for foreign investors. Shortly after TPPA negotiations began, PMI used similar trade and investment rules to challenge tobacco controls in Ireland, Norway, Uruguay, and Australia. PMI has also targeted Singapore, another TPPA country, for legislation that tracks closely with the 2009 Tobacco Control Act in the United States. In other words, the TPPA could empower the tobacco industry’s litigation strategy at a time when countries are striving to implement their obligations to restrict tobacco marketing under the Framework Convention on Tobacco Control (FCTC), the first global health treaty.

On the other hand, the TPPA could set a precedent by excluding tobacco from a trade agreement that provides greater market access and investor rights to challenge tobacco controls. Current TPPA countries are parties to FCTC, except for the United States, which signed but never ratified the treaty.

***CTPC Staff Comments:*** *As a primary issue with regards to the treatment of tobacco in the TPPA, Professor Stumberg discussed a compromise proposal which may be offered by the USTR. The USTR proposal has 3 elements:*

***U.S. proposal on tobacco.*** *Caught between tobacco growers from key electoral states and a rising tide of global litigation by tobacco companies, the Obama Administration is seeking a compromise.*

1. *Three elements. USTR proposes to:*
  - a. *Explicitly “recognize the unique status of tobacco products from a health and regulatory perspective.”*
  - b. *Eliminate tariffs on tobacco products.*
  - c. *Provide a “safe harbor” for regulations that restrict tobacco marketing within the United States. This would be “language in the ‘general exceptions’ chapter that allows health authorities in TPPA governments to adopt regulations that*

*impose origin-neutral, science-based restrictions on specific tobacco products/classes in order to safeguard public health."*

### ***Oversight questions on Tobacco from Professor Stumberg***

**1. Exception or carve-out.** If each element of the proposed exception were fixed, the result would be a stronger exception. But it would still leave governments vulnerable to expensive challenges, which have become the tobacco industry's weapon of choice. The general question is, should TPPA governments create a "safe harbor" from threats to their tobacco controls? More specifically, should the Maine CPTC recommend whether the U.S. proposal should be a stronger safeguard? Options include:

- 1. As proposed* – a narrow exception for rules adopted by health authorities that does not apply to national treatment, indirect expropriation or transparency obligations.
- 2. A stronger exception* – e.g., one that covers legislation and all trade and investment rules.
- 3. A clear carve-out* – which would simply say that the TPPA does not apply to tobacco trade or investment. This option would minimize the threat of expensive litigation.

**2. Compliance with policy on tobacco trade.** With or without the proposed exception, are U.S. negotiators honoring the directives of the Doggett Amendment and the Executive Order, which prohibit promoting tobacco or undermining other countries' restrictions on tobacco trade?

## **Pharmaceutical Provisions in the TPPA**

### **Introduction from Professor Stumberg**

Market-derived prices drove up state Medicaid reimbursements by an average of 13.1% per year for 15 years (1990 to 2005) until drugs accounted for 10% of state Medicaid payments. Most states, including Maine, responded with cost-containment strategies – including prior authorization (using preferred-drug lists), use of generics, and increased copayments – that reduced costs by as much as 50%. In response, drug companies sued Maine and other states, but U.S. courts upheld the state programs.

After years of consultation with the drug companies, USTR has proposed a Health Annex for the TPPA that requires reimbursement programs to shift to "market-

derived” pricing rules and procedures that give drug companies an opportunity to litigate against the programs that are now working to contain costs. The proposal is drawing fire as a boon to drug companies that are seeking to roll back cost-containment in other countries and foreclose reforms in the United States.

**CTPC Staff Comments:** *As a primary issue with regards to pharmaceutical provisions in the TPPA, Professor Stumberg discussed a series of USTR proposals pertaining to pharmaceuticals:*

1. **Pricing rules-** *require reimbursement programs to set “competitive market-derived” prices, or in the alternative, prices that “recognize the value” of patents.*
2. **Pricing procedures-** *require governments to disclose their methods for setting and negotiating reimbursement prices, enable drug companies to comment on pricing methods, give companies detailed written information about decisions on particular drugs, and provide companies with an individual appeal process.*
3. **Coverage-** *The U.S. proposal covers reimbursement programs of national health authorities. Unlike the last two trade agreements (Australia and Korea), it does not clearly state that Medicaid reimbursements are not covered by the pricing rules.*

#### ***Oversight questions on Pharmaceuticals from Professor Stumberg***

- A. **Cost to states.** Would the TPPA undermine cost-containment by states in Medicaid or by the federal government in the 340B program?
- B. **Coverage or carve-outs.** The U.S. proposal does not clearly carve out several federal reimbursement programs on which state governments rely to constrain pharmaceutical costs. The question is whether or not they too should be carved out of the proposed Heath Annex. These federal reimbursement programs include:
  - Medicaid, which is carved out of the Korea-U.S. FTA
  - 340B
  - Medicare Part B
- C. **Pricing rules.** After decades of “market-derived” pricing, drug prices are six times higher than they were in 1990.
  - a. Cost-containment strategies are working. How does replacing them with the U.S. proposal for market-derived prices benefit the public interest?
  - b. What is the theory by which the proposed pricing rules would help states or consumers contain the cost of prescription drugs?

- c. Should the United States hold other countries to rules that it does not apply to its own reimbursement programs?

**D. Future cost-containment strategies.** Critics of the proposed Health Care Annex are concerned that it will foreclose options for cost-containment that are now on the table. They fear that market-derived price rules will lock in the highest market prices in the world. A constructive way to discuss the risk of trade conflict is to compare the U.S. proposal for the TPPA with pending cost-containment proposals. How would the U.S. proposal constrain future cost-containment strategies such as these:

- a. Medicaid national pricing list – As noted above, the Affordable Care Act will change the drug pricing approach of Medicaid from state-level rebate negotiations to a national list that is similar to the approach in Australia and New Zealand.
- b. Medicare pool purchasing – There are a number of proposals to make better use of the federal government’s purchasing power to contain the cost of prescription drugs, particularly with respect to Medicare Part D.
- c. The Obama Administration proposed a measure to reduce the deficit by limiting “excessive payments for prescription drugs by leveraging Medicare’s purchasing power.”
- d. Senator Dick Durbin (D-Ill.) and Representative Jan Schakowsky (D-Ill.) proposed legislation to offer one or more Medicare Part D plans that would coexist with private plans. The bill would require the Secretary of HHS to negotiate with drug manufacturers for lower prices and establish formularies.
- e. Marketing and consumer protection – The Annex could undermine efforts to revise U.S. law regarding direct-to-consumer marketing during the initial period of sale when drugs have had limited use and when significant side effects are most likely to be exposed.



## **Government Procurement**

### **Introduction from Professor Stumberg**

TPPA negotiators are working on a procurement chapter, but no text is available. In the United States, procurement has been a more pro-democratic sector of trade policy. Beginning in the Uruguay Round of WTO negotiations in 1994, the U.S. Trade Representative invited governors to decide whether to commit their state to each successive procurement chapter of an FTA. Maine is among five states to open up the process further by requiring legislative approval of the decision to limit state procurement power under a trade agreement. A consequence of openness is that the number of participating states started with 37 (including Maine) in the WTO's Agreement on Government Procurement (GPA), then declined to 19 in CAFTA (2004), and more recently, to only 8 in the Peru FTA (2006). In addition to the GPA, Maine procurement is covered by the following procurement chapters of FTAs: CAFTA, Singapore, Chile, and Australia. Maine has declined to be bound by the more recent FTAs: Morocco, Peru, Colombia, and Panama.

USTR has yet to release a draft of TPPA procurement rules, so we summarize those from the GPA. In addition, the USTR has not indicated when states would be solicited to participate in TPPA procurement. In the meantime, there are developments outside of the TPPA that could significantly affect state procurement: a new GPA text has been negotiated; China is poised to join the GPA, and the EU and Japan are challenging procurement in Ontario with arguments that could subject state and local procurement to trade rules under trade agreements other than the GPA and procurement chapters.

### ***Oversight questions on Procurement from Professor Stumberg***

1. *TPPA procurement*
  - a. Would the TPPA include any innovations in its procurement chapter?
  - b. How would the TPPA safeguard state and local procurement preferences?
  - c. When will USTR invite states to decide whether to participate in the TPPA procurement chapter?
2. *GPA revisions*
  - a. How do provisions for domestic challenge work in the United States?
  - b. Will USTR submit the revised GPA for congressional ratification? Is there a legal basis for not seeking congressional ratification?

- c. Will USTR invite states to participate in the revised GPA?
- 3. *US-EU trade agreement*

Considering that EU countries are already party to the GPA, what are the implications of including procurement within a US-EU trade agreement?
- 4. *China as a party to the GPA*
  - a. When is China expected to join the GPA?
  - b. Considering China's demonstrated export capacity, what is the likely impact (on U.S. states) of China becoming a party of the GPA?
- 5. *GATS rules on procurement of services*
  - a. What is the status of these negotiations?
  - b. Is there a scenario by which WTO nations would apply GATS rules to all procurement of services (i.e., all state and local governments) regardless of GPA commitments?
- 6. *EU/Japan complaint against Ontario's FIT program*
  - a. USTR filed a brief that criticizes Canada's defense. Does the United States support the complaint by the EU and Japan against Ontario's FIT program?
  - b. If the EU's interpretations prevail, what are the implications for coverage of state and local procurement under GATT prohibitions on discrimination or prohibited subsidies under the Agreement on Subsidies and Countervailing Measures (SCM) agreement?
  - c. If the WTO adopts the EU's interpretation – that the GATT exclusion does not apply to procurement that favors local content – then what meaning is there in asking states to participate in FTA procurement chapters?